

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

VICTOR VALENZUELA,
Petitioner.

No. 2 CA-CR 2014-0219-PR
Filed September 16, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pinal County

No. S1100CR200801519

The Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Victor Valenzuela, Kingman
In Propria Persona

STATE v. VALENZUELA
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Victor Valenzuela petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Valenzuela has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Valenzuela was convicted of possession of a dangerous drug for sale, possession of drug paraphernalia, and possession of marijuana and was sentenced to concurrent prison terms, the longest of which was ten years. We affirmed his convictions and sentences on appeal. *State v. Valenzuela*, No. 2 CA-CR 2010-0295 (memorandum decision filed Mar. 23, 2011). He filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had found "no colorable claims" to raise in post-conviction proceedings. Valenzuela filed a pro se petition, and the trial court summarily denied relief. Valenzuela did not timely seek review of that ruling.

¶3 Valenzuela filed a second petition for post-conviction relief, claiming he had rejected a plea offer from the state "based on the erroneous advice of his lawyer," and because of the "failure of his lawyer to give [him] information necessary to allow him to make an informed decision whether or not to accept the plea," asserting his claim is not precluded pursuant to Rule 32.1(g), and citing *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), and *Martinez v. Ryan*, ___ U.S. ___,

STATE v. VALENZUELA
Decision of the Court

132 S. Ct. 1309 (2012). The trial court summarily dismissed Valenzuela's petition, and this petition for review followed.

¶4 On review, Valenzuela again asserts that he rejected the state's plea offer based on counsel's erroneous advice and that the claim is not precluded pursuant to Rule 32.1(g). A claim of ineffective assistance of counsel cannot be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a). Valenzuela seems to suggest, however, that *Frye*, *Lafler*, and *Martinez* are significant changes in the law applicable to his ineffective assistance claim. A claim that there has been a significant change in the law may be raised in an untimely proceeding. See Ariz. R. Crim. P. 32.1(g); 32.4(a).

¶5 We first observe, however, that those three cases were decided by the Supreme Court in March 2012—nearly a year before Valenzuela filed his pro se petition in his first post-conviction proceeding. Valenzuela has not explained why he failed to raise any claims based on those cases in his first proceeding. He thus has not complied with the requirement in Rule 32.2(b) that he “indicat[e] why the claim was not stated in the previous petition or in a timely manner.” Accordingly, his petition was subject to summary dismissal. Ariz. R. Crim. P. 32.2(b).

¶6 Moreover, *Frye* and *Lafler* are not significant changes in Arizona law. In those cases, the Supreme Court acknowledged a defendant has a right to effective representation by counsel during plea negotiations. See *Frye*, ___ U.S. at ___, 132 S. Ct. at 1407-08; *Lafler*, ___ U.S. at ___, 132 S. Ct. at 1384. But that has long been the law in Arizona. *State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000). A significant change in the law “requires some transformative event, a clear break from the past.” *State v. Poblete*, 227 Ariz. 537, ¶ 8, 260 P.3d 1102, 1105 (App. 2011), quoting *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009). Thus, Valenzuela was required to raise in his first post-conviction proceeding his claim of ineffective assistance of counsel related to the plea offer.

STATE v. VALENZUELA
Decision of the Court

¶7 And *Martinez* does not apply to Valenzuela's case. There, the Supreme Court addressed a defendant's equitable right to effective representation of initial post-conviction counsel in the context of default in federal habeas review. See *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 5, 307 P.3d 1013, 1014 (App. 2013), citing *Martinez*, ___ U.S. at ___, 132 S. Ct. at 1315, 1319-20. Valenzuela does not claim his post-conviction counsel was ineffective, and it would not be a cognizable claim in any event. *Id.* ¶¶ 4-6.

¶8 For the reasons stated, although we grant review we deny relief.